

1 Steven J. Nataupsky (State Bar No. 155,913)
snataupsky@kmob.com
2 Boris Zelkind (State Bar No. 214,014)
boris.zelkind@kmob.com
3 Ali S. Razai (State Bar No. 246,922)
ali.razai@kmob.com
4 KNOBBE, MARTENS, OLSON & BEAR, LLP
550 West C Street, Suite 1200
5 San Diego, CA 92101
Telephone: (619) 235-8550
6 Facsimile: (619) 235-0176

7 Attorneys for Plaintiff and Counter-Defendant
8 I-FLOW CORPORATION

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

12 I-FLOW Corporation, a Delaware corporation

13 Plaintiff,

14 v.

15 Zone Medical LLC, a California limited
liability company,

16 Defendant.

) Civil Action No. 08cv0057 DMS (NLS)

) **PLAINTIFF'S REPLY IN SUPPORT OF**
) **ITS MOTION TO CONSOLIDATE**

) Date: April 11, 2008

) Time: 1:30 p.m.

) Courtroom 10, 2nd Floor

) Honorable Dana M. Sabraw
)

1 Plaintiff I-Flow Corporation ("I-Flow") hereby submits this reply to Defendant Zone
2 Medical, LLC's ("Zone") Opposition to I-Flow's Motion To Consolidate Case No. 08cv0057
3 DMS (NLS) (the "Zone Case") against Zone and Case No. 07cv1200 DMS (NLS) (the "Apex
4 Case") against Defendants Apex Medical Technologies, Inc. ("Apex") and Mark McGlothlin
5 Pursuant To Fed. R. Civ. P. 42(a).

6 **I. SUMMARY OF ARGUMENT**

7 The Zone Case and the Apex Case are related cases involving common questions of
8 law and fact making the cases suitable for consolidation under Fed. R. Civ. P. 42(a). Zone
9 did not respond to the facts raised in I-Flow's Motion to Consolidate, including that the Zone
10 and Apex Cases involve common issues of law and fact and that consolidation of the Zone
11 and Apex Cases would serve judicial economy without creating the potential for delay,
12 confusion, and prejudice. Thus, I-Flow's motion stands unopposed on the merits. Zone's
13 sole basis for opposition to this motion rests on a mischaracterization of I-Flow's arguments
14 against application of the doctrine of claim splitting in a different currently pending motion.

15 **II. ARGUMENT**

16 **A. Zone Did Not Oppose The Merits Of I-Flow's Motion To Consolidate**

17 Zone has presented no arguments and provides no case law to suggest reasons why the
18 Court should not consolidate the related Zone and Apex Cases. In fact, Zone's Opposition to
19 I-Flow's Motion to Consolidate supports I-Flow's position that the related Zone and Apex
20 Cases involve common issues of law and fact. The related cases involve same '481 patent,
21 the same accused product and the same plaintiff. Zone provides no arguments against
22 consolidation, but rather returns to its faulty analysis of the doctrine of claim splitting
23 presented in Zone's Rule 12(b)(6) motion.

24 I-Flow pointed out that consolidation would serve judicial economy without creating
25 the potential for delay, confusion, and prejudice. Zone did not respond to this point. Zone
26 also did not dispute that both patent infringement cases involve the same patent, the same
27 product, the same plaintiff and overlapping arguments of infringement, validity and
28 enforceability. Thus, the merits of I-Flow's motion to consolidate remain unopposed.

1 **B. Zone Mischaracterizes I-Flow's Arguments In Another Co-pending Motion**

2 Zone's response consists of mischaracterizations of I-Flow's opposition to Zone's
3 currently pending Motion to Dismiss. Contrary to Zone's erroneous assertions, I-Flow has
4 never argued that the Apex Case and the Zone Case are unrelated. *See* Zone's Opposition, p.
5 2. I-Flow has always emphasized that the Zone Case and the Apex Case are related cases
6 involving common questions of law and fact. In fact, I-Flow identified the Apex Case in the
7 Notice of Related Cases that was filed with the commencement of this action.

8 Moreover, I-Flow has expressly argued that the two cases involve common questions
9 of law and fact in response to Zone's Motion to Dismiss. I-Flow announced its plans to seek
10 consolidation of the two related cases, arguing that the "patent infringement claims of the
11 [Zone and Apex Cases] involve the same '481 patent and the same Accused Solace Pump."
12 *See* Plaintiff's Opposition to Defendant's Motion To Dismiss, p. 7. Further, I-Flow argued
13 that if the motion to stay the Apex Case was denied, this action should also move forward
14 because of the substantial overlap of issues and the resulting conservation of judicial
15 economy. Throughout this litigation, I-Flow has consistently maintained the position that the
16 related Zone and Apex Cases involved common issues of law and fact. Any assertion to the
17 contrary is baseless.

18 Contrary to Zone's assertions, I-Flow opposed Zone's Rule 12(b)(6) claim splitting
19 motion based on the fact that Zone and Apex are not in privity. As explained in I-Flow's
20 opposition to Zone's co-pending motion, the doctrine of claim splitting requires parties to the
21 actions to be in privity. *See Adams v. California Dept. of Health Services*, 487 F.3d 684, 689
22 (9th Cir. 2007). Zone provided no facts to support the assertion that it is in privity with Apex
23 under the traditional understanding of the term or as a "virtual representative." Zone refused
24 to be bound by the judgment in the Apex Case, and thus it cannot be in privity with Apex.
25 Therefore, Zone's mischaracterization of I-Flow's opposition to the currently pending
26 motion to dismiss is groundless and in no way diminishes the facts presented by I-Flow,
27 which weigh heavily in favor of consolidation.

28 ///

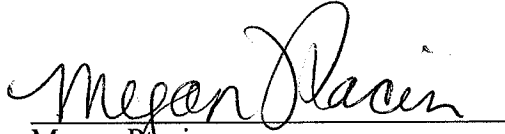
PROOF OF SERVICE

I am a citizen of the United States of America and I am employed in San Diego, California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, San Diego, California. On April 4, 2008, I caused **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO CONSOLIDATE** to be electronically filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the following person(s):

Norbert Stahl, Esq.
STAHL LAW FIRM
nstahl@patentlawservice.com

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 4, 2008 at San Diego, California.


Megan Placin

5085366
033108